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SUPREME COURT, U. S.

No. 71-1157

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD R. SHEWFELT AND IMPERIAL COUNTY LAND COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted on fourteen counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Shewfelt was sentenced to concurrent terms of two years' imprisonment, and petitioner Imperial County Land Company was fined $1,000 on each count. The court of appeals affirmed (Pet. App. A). The evi-

dence is summarized in the opinion of the court of appeals and need not be repeated here.

1. Petitioners' principal contention is that it was error for the district court not to give their requested instruction on good faith reliance on the advice of counsel since there was sufficient evidence to warrant the instruction. The court of appeals properly found this contention to be without merit (Pet. App. A4-A6).[1]

There was no indication in any of the testimony that petitioner Shewfelt or any representative of Imperial County Land Company went to any attorney and sought advice. Nor is there any evidence that Shewfelt or such other person received or followed any advice. Petitioner's testimony shows that he planned what he and his co-participant in the scheme would do, down to every detail, before they went to the lawyers; that they told the attorneys what they wanted done and the attorneys did it (Tr. 663-688).[2] As the court of appeals observed: "facilitation of [petitioners'] scheme was the essence of the attorney-client relationship in controversy" (Pet. App. A6).

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[1] Petitioners claim that the court of appeals did not find that there was no evidence to warrant the instruction, but, rather, that it erroneously assessed and weighed the evidence and concluded that the reliance on the advice of counsel theory was unreasonable (Pet. 14-15). However, a careful reading of the court's opinion and the cases cited therein do not substantiate this claim (Pet. App. A4-A6). The court of appeals failed to find "some foundation in the evidence however tenuous" (Pet. App. A5) warranting the instruction.

[2] "Tr." refers to the trial transcript.

Petitioners' claim that Shewfelt's own testimony supplied evidence that "he relied on the advice of his counsel" is unsupported by the record (Pet. 15).[2] At best petitioner Shewfelt's testimony shows that the attorneys involved remained silent when witnessing a course of action that was clearly fraudulent. This falls short of the evidence required for an instruction relating to the advice of counsel. See *Bisno* v. *United States*, 299 F. 2d 711, 719-720 (C.A. 9); see also, *Shale* v. *United States*, 388 F. 2d 616, 618 n. 2 (C.A. 5).

Absent evidence that petitioners made to an attorney a disclosure of the full facts and circumstances of the claim of Imperial County Land Company to the real property involved, actively seeking advice on the course of action to be taken, or that a course of action was proposed by an attorney, or that the specific action taken by petitioners corresponded to any advice of any attorney, that defense was not in the case. See *Bisno*, *supra*; *Shale*, *supra*.

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[2] The testimony relied on by petitioners to substantiate this claim is as follows (Tr. 681):

"Q. Now, you described in the conversation that you had with Mr. Ablon about this process of these suits; you relied on Mr. Ablon, as an attorney in dealing with this?

A. Yes Sir.

Q. You've indicated that you were not advised by Mr. Ablon, or anybody in his firm, of any impropriety in this method of handling these cases; were you ever so advised by Mr. Walton or his partner?

Mr. Brannigan: I'll object.

The Court: No, I'll allow it.

The Witness: No."

2. Petitioners submitted to the trial court a proposed instruction entitled "Action on Advice of Counsel" (Pet. App. C) and an instruction entitled "Good Faith as a Defense" (Pet. App. B). The trial judge told counsel, prior to instructing the jury, that he would follow their instructions "in my own words," with an exception not here relevant (Tr. 715). The district court then instructed the jury that a finding of untrue representations made in good faith would require rendering a verdict of acquittal (Tr. 774).[4] When the instructions were completed the court asked counsel if they had any objections to them (Tr. 780). Petitioners objected to the court's omission of their requested instruction on the advice of counsel as a defense (Tr. 780-781). The court stated that: "I didn't use that in so many words, it's true. I did talk, I'm sure you'll agree, upon the good faith of the defense, but, however, I didn't use your words and you may have an exception" (Tr. 781).[5]

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[4] The court instructed the jury as follows:

> Now, the terms "knowingly" and "willfully" mean that a defendant must act voluntarily and purposely and not merely because of a mistake or inadvertence or some other innocent reason. Untrue statements are not false unless they are made with knowledge that they are false and with intent to deceive.
>
> In other words, if you find that an untrue representation was made by a defendant in good faith, or is the product of an innocent mistake of judgment, you must acquit him or it of the mail fraud charges, for an honest intent is always a defense to fraud [Tr. 774].

[5] Petitioners subsequently filed a motion for a new trial asserting, *inter alia*, that it was error for the court to have

Petitioners contend that these facts show a determination by the district court that an instruction on the advice of counsel was warranted by the evidence, and that the court of appeals erred in disregarding that finding. However, the district court's comments above cannot fairly be said to have constituted any such determination. The fairest reading of the district court's comments is that it found the defense of good faith—and only that defense—raised by the evidence, and appropriately instructed the jury on that defense. The petitioner's argument that the district court's refusal to give a specific instruction on advice of counsel was based on a misapprehension that that instruction was included in the charge already given (Pet. 13) is nothing more than speculation and supposition. Hence, the court of appeals could properly examine the evidence and determine that the instruction was not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

MAY 1972.

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denied their requested instruction on the advice of counsel (Tr. 789). This claim again was considered by the district court and rejected (Tr. 790).

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